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No. 80-1794

In the Supreme Court of the United States

OCTOBER TERM, 1980

JESSE C. HARRIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the Court of Claims correctly sustained the Civil Service Commission's decision upholding petitioner's separation from his civilian position with the Army.

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OPINION BELOW

The opinion of the Court of Claims (Pet. App. A-2 to A-13) is reported at 640 F.2d 1309.

JURISDICTION

The judgment of the Court of Claims was entered on January 28, 1981. The petition for a writ of certiorari was filed on April 27, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1255.

STATEMENT

1. In enacting 10 U.S.C. 1586, Congress provided for rotation of civilian employees of the defense establishment between duty posts within and outside

of the United States, "in order to advance the programs and activities of the [d]efense [e]stablishment." 10 U.S.C. 1586(a). Pursuant to 10 U.S.C. 1586(b), the Secretary of the Army has prescribed regulations governing the operation of the Army's civilian employee rotation program. See Department of the Army Civilian Personnel Regulations ("DACPR") 352.8 (Pet. App. A-38 to A-45). Under these regulations, a qualifying civilian employee is afforded a time-limited right to reemployment in his former position in the United States upon completion of his foreign duty tour, provided that he complies with specified procedures for the exercise of that right.

DACPR 352.8-5 and 352.8-6 (Pet. App. A-38 to A-40) govern the duration of reemployment rights. DACPR 352.8-5 provides that the duration of the reemployment rights granted upon acceptance of an overseas assignment corresponds to the period of the initial foreign duty tour. Under DACPR 352.8-6, the Army may extend reemployment rights upon extending an overseas work assignment, to allow reemployment after a total absence of up to five years, upon determining that such an extension is in the Army's best interest. The regulation provides:

> Although the personal desires of the employee to remain in the oversea area must be given full consideration when authorizing an extension, the need of the oversea activity is the primary factor in arriving at a decision. However, the needs of the former employing activity in the United States will be given full consideration in making the final determination.

DACPR 352.8-6a (Pet. App. A-39). Extensions beyond five years are possible only when a suitable

replacement has not been found; special personal circumstances, such as imminent retirement, make it inadvisable to order the employee's return; or special work circumstances make the further extension desirable. DACPR 352.8-6b (Pet. App. A-40).

Where no extension is granted, the Army notifies the employee of the date by which he must exercise his existing reemployment rights. DACPR 352.8-7c (Pet. App. A-42 to A-43). The notice informs the employee that failure to make timely application for exercise of these rights will result in his return to the United States and that refusal to comply will result in the employee's separation from the service (*ibid.*).

DACPR 352.8-8 (~~10 Apr. 1972~~) makes exercise of reemployment rights contingent upon formal application for such rights within 30 calendar days of the period for which such rights were granted. DACPR 352.8-8c (Pet. App. A-43 to A-44). To avail himself of these rights, the employee must submit a letter, accompanied by a completed Personal Qualifications Statement (Standard Form 171) and certain Defense Department forms indicating satisfactory completion of the overseas tour. DACPR 352.8-8c(1) (Pet. App. A-44). DACPR 352.8-11 (Pet. App. A-44 to A-45) provides the authority for directing the return to the United States of employees who have been notified of the expiration of their rights but who have nevertheless failed to apply to exercise those rights.

2. The facts, as found by the Civil Service Commission (Pet. App. A-17 to A-22) and accepted by the Court of Claims (see *id.* at A-3 to A-4), are largely undisputed. On January 5, 1972, petitioner, a communications specialist with the Department of the Army at Fort Huachuca, Arizona, executed a re-

employment rights agreement as a result of which he accepted an overseas assignment with the U.S. Army Communications-Electronics Engineering Installation Agency in West Germany (Pet. App. A-2). In accordance with the provisions of DACPR 352.8 summarized above, the agreement granted petitioner reemployment rights for his original 36-month foreign tour and any approved extensions thereof, not to exceed a total of five years (*id.* at A-3). According to the contract, petitioner understood that if he failed to apply to exercise these rights at the end of his tour, the Army could direct him to return to his former position, and, if he disregarded such a directive, his reemployment rights would expire and he would be subject to separation from the service (*ibid.*). Through a supplement to this agreement, petitioner's reemployment rights were extended for an additional 24 months, expiring on January 17, 1977 (*id.* at A-3 to A-4).

On September 30, 1976, petitioner married a Syrian national medical doctor. By letter dated December 1, 1976, he requested a 120-day delay in his scheduled January 17, 1977, return to the United States in order to obtain necessary immigration documents for his wife. In response to this request, his commander, Colonel George F. O'Brien, advised petitioner that a 30-day delay would be requested on his behalf and that, should petitioner need additional time, the Army would entertain a request upon presentation of documents evidencing petitioner's efforts to obtain his wife's visa (Pet. App. A-4).

Petitioner never presented such documentation. Instead, petitioner told Col. O'Brien and another Army official on February 1, 1977, that he did not plan to return to the United States or to exercise

his reemployment rights and that he was no longer having difficulty procuring his wife's visa (Pet. App. A-19, A-27). Petitioner acknowledged at the hearing held by the Civil Service Commission that he had said he would not be returning to the United States (Tr. 13) and that the documentation he was actually awaiting was related solely to his wife's professional employment prospects and was not necessary for her visa (Pet. App. A-7, A-27; Tr. 18).

The 30-day extension approved by Col. O'Brien elapsed without petitioner's either submitting the proof necessary for a further extension or taking the requisite steps to exercise his reemployment rights. Accordingly, by letter dated February 24, 1977 (Pet. App. A-54 to A-57), Major Albert R. Pettingill directed petitioner to make arrangements to return to the United States and exercise his reemployment rights by reporting to Army barracks in Mannheim, Germany, by March 7, 1977. Failure to do so, the letter further stated, would be construed as a refusal to accept an assignment to his former position and would result in a proposal to separate him from the federal service. Petitioner responded by letter of March 2, 1977, requesting an additional delay of 90 days to obtain necessary documentation for his wife's visa (*id.* at A-4).

Petitioner failed to exercise his reemployment rights by March 7, 1977. Accordingly, on March 18, the Army notified petitioner that it proposed to separate him from the service and that he had a right to reply to the notification personally or in writing and to present supporting witnesses and affidavits (Pet. App. A-4; Exh. 5). On March 21, the Army responded to petitioner's March 2 letter, advising him that once he accomplished the procedures outlined on

February 24, his request for a further delay in travel would be considered, provided he furnished substantial reasons for the request (Pet. App. A-4 to A-5). On March 30, petitioner submitted a written reply to the March 18 proposal to remove him, charging that the denial of his request for a further extension of his overseas tour of duty was "erroneous" in view of the "undue hardship" that would result if he were forced to return to the United States before obtaining data to support his wife's visa. Again petitioner attached no documents or other proof establishing need for a further extension.

On April 18, 1977, Col. O'Brien answered petitioner's March 30 letter and affirmed the separation proposal on the grounds that petitioner had said he did not want to return to the United States and had ignored both the February 24 letter directing his return and the March 21 letter advising him of the means by which to request an extension (Pet. App. A-68 to A-72). On April 29, Col. O'Brien notified petitioner that, after reviewing petitioner's March 30 reply to the March 18 proposed removal notice, he had found that removal was warranted and would become effective on May 13, 1977, because petitioner had failed to accept reassignment to his former position in accordance with his reemployment rights agreement (Pet. App. A-5; Exh. 7).

3. On administrative appeal, the Civil Service Commission determined, after a hearing, that petitioner's removal was proper (Pet. App. A-14 to A-36). The Commission stated that the Army had complied with all of the procedural requirements set forth in the relevant statute and regulations and that the Army's finding of grounds for petitioner's removal was supported by the evidence.

Petitioner then filed this action seeking restoration of his position and back pay. The Court of Claims granted summary judgment for the government (Pet. App. A-2 to A-13). The court agreed with the Commission that the Army's decision complied with applicable statutes and regulations and was supported by substantial evidence (Pet. App. A-9). The court also concluded that the Army's regulations governing reemployment rights were valid and consistent with the statutory authority, 10 U.S.C. 1586(b); that petitioner had received the requisite opportunity to respond to the Army's notice of proposed removal; that his response received full administrative consideration; and that the removal action was a proper exercise of the Army's discretion (Pet. App. A-9 to A-11).[1]

ARGUMENT

1. a. Petitioner concedes (Pet. 26) that he ignored the procedures set out in DACPR 352.8-8, known to him from the outset of his foreign assignment, governing exercise of reemployment rights. He does not dispute the Court of Claims' finding (Pet. App. A-8 to A-9) that he not only failed to apply for reemployment voluntarily but also disregarded the subsequent order to arrange for his return to the United States. Indeed, petitioner admitted at the Civil Service Commission hearing that he told his supervisors he did not want to return (Tr. 13). Moreover, notwithstanding his professed need for a second extension of reemployment rights in order to

[1] The court also found no merit in petitioner's claims that the removal action was barred by the doctrine of estoppel and that it deprived him of property rights in his job without due process of law (Pet. App. A-12 to A-13).

obtain a visa for his wife, petitioner testified that the documents he was waiting to secure after December 1976 were not in fact related to his wife's visa but only to her job prospects (Pet. App. A-7, A-27; Tr. 18). Accordingly, petitioner does not challenge the fact, properly stressed by the Court of Claims (Pet. App. A-5, A-7), that he never offered any proof of his purported difficulties in obtaining the visa. Under these circumstances, the Army's action removing petitioner from the service was not only permissible but was indeed required by DACPR 352.8-7c (Pet. App. A-42 to A-43).

b. Petitioner nevertheless contends (Pet. 11-16) that this Court should grant certiorari to determine whether the Civil Service Commission and the Court of Claims correctly concluded (Pet. App. A-11, A-22 to A-23) that the Army considered petitioner's March 30 response to the notice of proposed removal before making its final decision, and accordingly did not violate 5 C.F.R. 752.202(b) (1979). That regulation gives a federal employee "a reasonable time for answering a notice of proposed adverse action and for furnishing affidavits in support of his answer," and states that, if the employee does answer, "the agency shall consider his answer * * * in writing." This fact-bound contention is frivolous.

On its face, Col. O'Brien's April 18 reply to petitioner's March 30 letter (Pet. App. A-68 to A-72) shows that Col. O'Brien duly considered petitioner's argument that he should not be removed for failing to exercise his reemployment rights because he needed more time to obtain data supporting his wife's visa. Col. O'Brien rejected that argument for reasons that he set forth in detail. These reasons

included petitioner's February 1 statement to his supervisors that he would not return to the United States and his disregard for both the February 24 directive to exercise his reemployment rights and the March 21 notice offering the possibility of an extension provided he complied with the conditions previously stated (Pet. App. A-68 to A-72).[2]

2. a. Petitioner claims (Pet. 16-19) that the Army violated DACPR 352.8-6a by failing to grant his request for an additional extension of time to exercise his reemployment rights. That regulation states, in pertinent part:

> 8-6 EXTENSION OF REEMPLOYMENT RIGHTS
>
> a. *Extension for five years or less.* * * *
>
> Although the personal desires of the employee to remain in the oversea area must be given full consideration when authorizing an extension, the need of the oversea activity is the primary factor in arriving at a decision. However, the needs of the former employing activity in the United States will be given full consideration in making the final determination.

The facts found by the Commission, affirmed by the Court of Claims and largely admitted by petitioner, show that petitioner's desires surely received the "full consideration" contemplated by DACPR 352.8-6a. Petitioner appears to assume that failure to grant his request for a further extension was tantamount to failure to consider that request. However,

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[2] Contrary to petitioner's statement (Pet. 14), Col. O'Brien testified that he had personally considered the March 30 letter (Tr. 51, 65).

as the Court of Claims stressed (Pet. App. A-6), and as petitioner concedes (Pet. 25), the regulation cited by petitioner expressly provides that the Army's needs must take precedence over the employee's personal desires in decisions regarding extension of reemployment rights.

b. Petitioner's contention (Pet. 19-22) that the removal process violated DACPR 352.8-8 (Pet. App. A-43 to A-45) is also untenable. Petitioner acknowledges (Pet. 26) that he never applied to exercise his reemployment rights as prescribed in DACPR 352.8-8c(1), and thereby to reopen the possibility of an extension of time, although Army correspondence as late as March 21, 1977, urged him to do so (Pet. App. A-8, A-68 to A-72). Because petitioner was allowed well in excess of the 30 days following completion of overseas duty permitted by DACPR 352.8-8c within which to exercise his reemployment rights, there is no basis for his claim (Pet. 19-21) that the Army ordered his return prematurely.[3]

3. Petitioner's assertion, raised for the first time in this petition (Pet. 22-25), that DACPR 352.8-6 is ultra vires because it fails to give controlling weight to the employee's desires, is refuted by the plain language of the underlying statute. That provision was enacted "[i]n order to advance the programs and activities of the [d]efense [e]stablishment"; the rotation program established pursuant to its authority must be "consistent with the missions of the [d]efense [e]stablishment and sound principles of administration." 10 U.S.C. 1586(a). Indeed, the leg-

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[3] Contrary to petitioner's contention (Pet. 20), DACPR 352.8-11 (Pet. App. A-44 to A-45) confers authority on the Army to make travel arrangements necessary to take advantage of reemployment rights.

islative history cited by petitioner (Pet. 23-25) demonstrates that rights created under the statute may not impinge on the "efficient operation" of the military services (Pet. 24). Clearly, nothing in the statute, the legislative history, or any other source suggests that regulations implementing 10 U.S.C. 1586 must allow limitless extensions of initial reemployment rights where an employee has refused to document his need for more time or to follow the procedures established for exercising his rights.

4. Petitioner finally urges that the Army abused its discretion in his case (Pet. 27-30). It is obvious, however, that the Court of Claims correctly affirmed the Civil Service Commission's finding (Pet. App. A-31) that the Army acted within its discretion in removing petitioner from his position. See, *e.g.*, *Wathen* v. *United States*, 527 F.2d 1191, 1197 (Ct. Cl. 1975), cert. denied, 429 U.S. 821 (1976). Petitioner knew from the beginning of his tour of duty, in January 1972, that he was subject to separation if he failed to exercise his reemployment rights and return to his job in the United States at the end of his foreign assignment. The Army granted petitioner extensions totaling 25 months beyond his initial tour and held out the possibility of further extensions if petitioner substantiated his claim that he was having difficulty getting his wife a visa. He failed to do so, telling his supervisors instead that he did not want to return to the United States.

In sum, as the record outlined above plainly demonstrates, petitioner rejected all of the Army's efforts at reaching an accommodation through procedures consistent with the applicable regulations. Under these circumstances, the decision to remove petitioner was not an abuse of discretion.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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